No. 94-947

In the Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TOWN & COUNTRY ELECTRIC, INC., AND AMERISTAFF PERSONNEL CONTRACTORS, LTD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF AUTHORITIES

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1. Respondent argues (Br. in Opp. 9-13) that certiorari should not be granted because the Eighth Circuit's decision is based on the "specific facts of this case relating to the Union's salting resolution." Respondent misinterprets the decision below.

The Eighth Circuit explained (Pet. App. 5a) that it must "first consider whether the two full-time union organizers were statutory employees and then decide the same issue for the other nine union members, including Hansen," who were not union officials but who stood to be reimbursed by the Union for organizing respondent's workforce. In deciding the first question, the Eighth Circuit did not refer at all to the Union's job salting

resolution. Rather, it recognized that "[t]he circuits are split" on the broader question of "whether paid union organizers are employees under the Act." *Ibid.* The court then expressly endorsed the Fourth Circuit's conclusion in *H.B. Zachry Co.* v. *NLRB*, 886 F.2d 70 (1989), that paid union organizers are not statutory "employees," and rejected the contrary conclusion of the District of Columbia Circuit on that issue in *Willmar Electric Service, Inc.* v. *NLRB*, 968 F.2d 1327 (1992), cert. denied, 113 S. Ct. 1252 (1993). Pet. App. 7a. In agreement with *Zachry*, the Eighth Circuit thereupon held that an individual (such as the two union officials in this case) who works simultaneously for a union as a paid organizer and for a nonunion employer has an inherent conflict of interest which, under common law agency principles, precludes him from loyally serving the employer and thus being an "employee." Thus, in the court's view, the Act's protections against antiunion discrimination did not extend to the two union officials. *Id.* at 6a-9a. The existence of the salting resolution played no role in that determination.

In holding that the second category of paid union organizers in this case—the nine union members who had applied for jobs (and in Hansen's case, received one)—were also not statutory "employees," the Eighth Circuit concededly identified as "[m]ost important" the fact that "these applicants were subject to Local 292's job salting organizing resolution." Pet. App. 9a.[1] But the court made it apparent that it would have reached the same result with respect to those members even had

[1] That resolution provided that members could work for nonunion employers "only if they work for organizational purposes," and that union members were to leave the nonunion job if the Union directed them to do so. Pet. App. 9a-10a.

there been no salting resolution. That is so for two reasons. First, before discussing the salting resolution, the court noted that the union members were "under [the Union's] control" and had been encouraged by the Union "to apply and to organize [respondent's] employees if hired," and, significantly, that the Union had pledged to "pay those hired the difference between union scale and [respondent's] wages as well as their travel expenses." Pet. App. 9a . Under the reasoning of *Zachry*, which the Eighth Circuit had earlier endorsed in its opinion, the Union's payment to those members during the course of their employment with respondent would create the same type of conflict of interest which had disqualified the two full-time paid union organizers from "employee" status under the Act.

Second, as we note in our petition (Pet. 27 n.13), the salting resolution does no more than explicitly recognize the leverage a union typically has over those of its members whom it has allowed to work at a nonunion employer. The resolution in no respect alters the reality that a union can often bring to bear significant economic pressure on a member to leave a nonunion job. For this reason, the Eighth Circuit's acknowledgment (Pet. App. 10a) that a union member who zealously seeks to organize his fellow employees at a nonunion job is an "employee" protected by the Act is telling. The only meaningful distinction between that zealot and the union members here is that the latter are paid by the union and the former is not. A salting resolution does not enhance the control that the union already may exercise over its members by virtue of its standard constitution or bylaw provisions that prohibit members from working for nonunion employers without permission and that provide for economic and disciplinary sanctions against members who flout that command. See *Florida Power & Light Co.*

v. *International Bhd. of Electrical Workers, Local 641*, 417 U.S. 790, 793 (1974). A union member who would seek to organize a nonunion employer, whether because he desires additional pay or acts out of zealotry, is simply not likely to work for a nonunion employer absent permission from the union—and if that permission is revoked, he is likely to resign.

In sum, the presence of the salting resolution does not materially distinguish this case from the other circuit court decisions concerning the status of paid union organizers, which respondent does not dispute are in conflict.[2] That resolution had no bearing on the Eighth Circuit's holding that the two full-time paid organizers were not statutory "employees," and it served only to buttress the court's conclusion that the nine union members who would have been reimbursed by the Union for their organizational activities were likewise not "employees." Accordingly, this case provides an

[2] Respondent does attempt (Br. in Opp. 12-13) to distinguish the District of Columbia Circuit's decision in *Willmar*, but that attempt is unavailing. In *Willmar*, the court held that a full-time union official, Hendrix, was a statutory "employee." 968 F.2d at 1329-1330. The court found no inherent conflict between a paid union organizer's duty to his union and his duty to the targeted nonunion employer. *Ibid.* The court reserved for another day the question of what circumstances would have to exist for an employer, notwithstanding a union-affiliated worker's "employee" status, to discharge that worker as disloyal under a neutrally applied policy of firing disloyal employees. *Id.* at 1330-1331; see also *id.* at 1330 (employer may not fire arsonist employee "by saying that arsonists are not 'employees'; it must prove that it would have fired the arsonist even if he hadn't been engaged in union-related activities"). Thus, the court refused to hold, as the Eighth Circuit did here, that financial ties between a worker and a union would deprive the worker of "employee" status under the Act.

appropriate vehicle for this Court to decide the legal question of whether a paid union organizer is an "employee" under Section 2(3) of the National Labor Relations Act. Indeed, as we have noted (Pet. 27-28), this case, unlike others that have raised that question, has the singular advantage of presenting that issue in several distinct factual contexts, helping to ensure that the Court's resolution of that issue will not prove factbound.

2. Respondent also contends (Br. in Opp. 13-24) that the court of appeals' decision is correct, for the reason that a conflict of interest is invariably created when a paid union organizer works for an employer whom the union seeks to organize. Respondent's contentions are unpersuasive.

a. Respondent first notes (Br. in Opp. 16) that the relationship between a nonunion employer and a union seeking to organize its employees is often adversarial.[3] From this truism, respondent concludes that a paid union organizer will therefore invariably "serve the interests of his primary master, the union, by acting adversely to the interests of the targeted nonunion employer while masquerading as an employee of that employer." *Id.* at 16-17. Respondent's broad assertion that the adversarial relationship between a union and an employer mandates holding paid union organizers not to be statutory "employees," and hence subject to antiunion discrimination, is at odds with the fundamental premise

[3] Respondent relies for this proposition (Br. in Opp. 16) upon Board Member Oviatt's concurring opinion in *Sunland Construction Co.*, 309 N.L.R.B. 1224, 1232 (1992). Respondent does not mention that Member Oviatt agreed with the Board's conclusion that paid union organizers are statutory "employees." See Pet. 27 n.12.

of the Act itself, that "[p]rotection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 182 (1941). As the Board explained (Pet. App. 38a) in this case:

> The statute is founded on the belief that an employee may legitimately give allegiance to both a union and an employer. To the extent that may appear to give rise to a conflict, it is a conflict that was resolved by Congress long since in favor of the right of employees to organize.

Moreover, as we have noted (Pet. 20), the Act leaves the employer entirely free to discipline or discharge a union-affiliated employee for misconduct or lack of productivity, see also *Willmar*, 968 F.2d at 1330, and to prohibit union solicitations during working time.[4] Indeed, in

[4] Respondent mistakenly asserts (Br. in Opp. 23) that the Board demonstrated in this case that it "does not recognize an employer's right to enforce a no solicitation rule against" a paid union organizer. There is no evidence in the record that respondent maintained a rule barring solicitation during working time. Rather, the Board found, based on the evidence credited by the administrative law judge, that respondent's project superintendent threatened union member Hansen with discharge if he continued to talk about the Union. See Pet. 5. Respondent's contention (Br. in Opp. 6) that Hansen engaged in union activity during work time is based on testimony discredited by the ALJ and the Board. Pet. App. 85a, 91a-94a, 109a-110a.

Respondent misrepresents the Board's decision in other respects. For example, respondent contends that "[e]ssentially the only basis" for crediting the union's witnesses was the ALJ's "improper presumption that all nonunion employers will discriminate against people affiliated with a union which might attempt to unionize them." Br. in Opp. 5 n.3; see also *id.* at 7 n.4. The ALJ made no such presumption. Rather, his decision (Pet. App. 43a-133a) sets out an ample factual basis for his findings of antiunion discrimination, including respondent's opposition to the unionization of its employees. See *R.J. Lallier Trucking* v. *NLRB*, 558 F.2d 1322, 1325 (8th Cir. 1977) ("a general bias or hostility toward the union * * * are [*sic*] proper and highly significant factors for Board evaluation in determining motive").

the job salting case to which respondent adverts (Br. in Opp. 19-20, 23 (citing NLRB General Counsel's Report (Nov. 28, 1994), Daily Lab. Rep. (BNA) No. 226, at D-1, D2-D3 (Nov. 28, 1994)), the General Counsel refused to issue a complaint regarding the discharge of paid union organizers who engaged in misconduct on the job. That case illustrates that employers already have broad authority, under the Act, to respond to any abuses by employees who happen to be paid union organizers.

b. Respondent analogizes a union's practice of allowing members to serve as paid organizers at a nonunion employer to an employer's use of employees to spy on other employees' union activity. Br. in Opp. 18. That analogy is fundamentally inapt. An employer's use of "spies" violates the Act because it tends to coerce and restrain employees' organizational activity while vindicating no legitimate employer objective. See *Fruehauf Trailer Co.*, 1 N.L.R.B. 68, 73, 77-78 (1935). By contrast, organizational activity on behalf of a union "is at the very core of the purpose for which the [Act] was enacted." *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978); see also *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 609 (1991).

c. Finally, respondent errs in asserting (Br. in Opp. 23) that the situation in this case is only "marginally different" from a strike setting, in which, the Board has

stated, an employer's refusal to hire a paid organizer does not violate the Act. See *Sunland Construction Co.*, 309 N.L.R.B. 1224 (1992) (cited at Pet. 18 n.10). In *Sunland*, the Board reasoned that the employer has a "substantial and legitimate" interest in refusing to place on the payroll a person who would immediately begin encouraging other employees to withhold their services. 309 N.L.R.B. at 1231. The Board observed that it was rational to presume that "someone who is being paid by the organization that is seeking to induce employees to withhold services would not be inclined wholeheartedly to provide services for the duration of the organization's efforts." *Id.* at 1231 n.41. It is equally rational, however, for the Board to have concluded that, in the nonstrike context, "there is [no] inherent conflict between carrying out the duties of an employee and operating as a paid union organizer." *Ibid.*

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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